

(2020) 06 SC CK 0026

In the Supreme Court Of India

Case No : Criminal Appeal No. 192 Of 2011

Rana Nahid @ Reshma @ Sana & Anr

APPELLANT

Vs

Sahidul Haq Chisti

RESPONDENT

Date of Decision : 18-06-2020

Acts Referred:

Constitution Of India, 1950 — Article 14
Code Of Criminal Procedure, 1973 — Section 30, 125, 125(1), 126, 127, 128
Muslim Women (Protection Of Rights On Divorce) Act, 1986 — Section 2(c), 3, 3(1), 3(1)(a), 3(1)(c), 3(1)(d), 3(2), 3(3), 3(4), 4, 4(c), 4(1), 4(2), 5, 7, 31
Family Courts Act, 1984 — Section 5, 6, 7, 7(1), 7(1)(d), 7(1)(f), 7(2)(a), 7(2)(b), 7(2)(d), 8, 8(b), 9, 10, 10(1), 10(2), 12, 13, 14, 16, 18, 20

Citation : (2020) 7 SCC 657 : (2020) 7 JT 576 : 2020 (8) Scale 1 : (2020) 2 Crimes 265

Hon'ble Judges : R. Banumathi, J; Indira Banerjee, J

Bench : Division Bench

Advocate : Sunil Kumar Singh, Rameshwar Prasad Goyal, Puneet Jain, Pratibha Jain, Christi Jain

Final Decision : Allowed

Judgement

R. Banumathi, J

1. This appeal arises out of the judgment dated 28.07.2010 passed by the High Court of Rajasthan Bench at Jaipur in S.B. Criminal Revision Petition No. 295 of 2009 in and by which High Court allowed the revision petition filed by the respondent thereby setting aside the order passed by the Family Court which has converted the application for maintenance under Section 125 Cr.P.C. into Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 and also setting aside the maintenance amount awarded to appellant No.1.

2. Brief facts of the case which led to the filing of this appeal are that the marriage between appellant No.1-Rana Nahid @ Reshma @ Sana and respondent Sahidul Haq Chisti was solemnized on 08-03-1998 as per the Muslim rites and appellant No.2-son was born out of the wedlock. Alleging that appellant No.1 was

subjected to cruelty and harassment for additional dowry and that she was thrown out of matrimonial home, appellants filed a petition under Section 125 Cr.P.C against the respondent. Thereafter, on 24-03-2008, appellant No.1 amended the petition on the basis of divorce given on 23-04-2008 by the respondent-Sahidul. The appellants averred that the respondent is working as a lecturer in Rajkiya Moiniya Senior Secondary School, Ajmer and has been earning a sum of Rs.20,000/- per month approximately and he also serves in "Mehmani ki Dargah" from where he earns Rs.20,000/-per month and thus claimed a maintenance of Rs.6,000/- per month towards her maintenance and Rs.2,500/- per month towards maintenance of her son-appellant No.2 herein. The respondent has admitted that he is a lecturer in Govt. Job and receives a salary of Rs.18,500/- per month.

3. The Family Court held that as the appellant No.1 is a Muslim divorced woman, her petition for maintenance under Section 125 Cr.P.C. is not maintainable. The Family Court treated the said application under Section 125 Cr.P.C. as application under Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (Muslim Women's Protection Act) in the light of the judgment of this Court in *Iqbal Bano v. State of Uttar Pradesh & Anr.* (2007) 6 SCC 785. The Family Court ordered respondent-Sahidul Haq to pay rupees three lakh in lump sum to appellant No.1 towards her maintenance and future livelihood. The application of appellant No.2 claiming maintenance has been accepted under Section 125 Cr.P.C. and the respondent has been ordered to pay Rs. 2,000/- per month towards his maintenance till he attains majority.

4. Being aggrieved by the quantum of maintenance, the appellants filed Revision Petition No. 295 of 2009 before the High Court of Rajasthan at Jaipur for enhancement of maintenance. The respondent also filed Revision Petition No.221 of 2009 against the order of the Family Court. While the matter was pending before the High Court, a sum of Rs. 1,00,000/- was paid by the respondent to appellant No.1. The High Court held that the application under Section 125 Cr.P.C. was made before the Family Court which does not have jurisdiction to entertain an application under Section 3 of the Muslim Women's Protection Act. The High Court held that the order of the Family Court converting the application under Section 125 Cr.P.C. into an application under Section 3 of the Act is without jurisdiction and on those findings, set aside the order of the Family Court to that extent and allowed the revision preferred by the respondent. However, liberty was given to appellant No.1 to file an application under Section 3 of the Act of 1986 before the Court of competent Magistrate. So far as the amount of rupees one lakh already paid to appellant No.1, she was allowed to retain it, subject to the final outcome of the application under Section 3 of the Act. The High Court, however, maintained the maintenance amount awarded to appellant No.2.

5. It is submitted by the learned counsel for the appellants that the Family Court has jurisdiction to decide cases under Section 3 of the Muslim Women's

Protection Act and the High Court was not right in setting aside the same and erred in directing the appellant No.1 to file application under Section 3 of Muslim Women's Protection Act.

6. Refuting the contentions, learned counsel for the respondent submitted that an application under Section 125 Cr.P.C. cannot be maintained by a Divorced Muslim Wife unless there is a consent of both that the Husband and the divorced Wife to be governed by Section 125 Cr.P.C as per Section 5 of the Muslim Women's Protection Act. It was further submitted that the Family Court has no jurisdiction to entertain applications under Section 3 of the Act as the jurisdiction to file the case under Muslim Women's Protection Act has not been conferred on the family courts under Section 7(2) (b) of the Family Courts Act, 1984.

7. Having regard to the rival contentions, the question falling for consideration is whether the family court has jurisdiction to try application filed by Muslim divorced woman for maintenance under Section 3 of Muslim Women (Protection of Rights on Divorce) Act, 1986.

8. For proper appreciation of the contentions, we may usefully refer to the provisions of the Act and the genesis of the enactments that are under consideration before us.

9. Under the Muslim personal law, a divorced woman could be awarded maintenance only during the iddat period and not later. In Mohd. Ahmed Khan v. Shah Bano Begum and others (1985) 2 SCC 556, the Supreme Court upheld the right of Muslim divorced wife under Section 125 Cr.P.C. because Explanation (b) of Section 125 (1) Cr.P.C. includes a divorced wife till she remarries. In Shah Bano case, the Supreme Court has held that a Muslim divorced woman unable to maintain herself is entitled to claim maintenance under Section 125 Cr.P.C. even after the iddat period was over.

10. After Shah Bano case, the Muslim Women (Protection of Rights on Divorce) Act (For short 'Muslim Women Protection Act') was enacted with effect from 19.05.1986 as per which a divorced Muslim woman is not only entitled to maintenance for the iddat period from her former husband but also to a reasonable and fair provision for the future. The preamble of the Muslim Women (Protection of Rights on Divorce) Act, 1986 reads as under:-

"An Act to protect the rights of Muslim Women who have been divorced by, or have obtained divorce from, their husbands and to provide for matters connected therewith or incidental thereto."

11. Muslim Women (Protection of Rights on Divorce) Act, 1986 does not deviate itself from the purpose, object and scope of the provisions of maintenance under Criminal Procedure Code. The provisions of the Act are not inconsistent with the provisions of Chapter IX of the Code. The provision of this enactment provides remedies beneficial to the Muslim women divorcee by making the former husband liable to provide the divorced woman with reasonable and fair provision

in addition to providing maintenance and where the husband fails to comply with the order without sufficient cause, the Magistrate may issue warrant for levying the amount of maintenance and may sentence him to imprisonment for a term which may extend to one year. The near relatives of the woman are also made liable under Section 4 of the Act. In case, the relatives are not in a position to pay her, the State Wakf Board is also made liable to provide maintenance. While the Criminal Procedure Code provides the relief of maintenance only, the Act of 1986 furnishes to divorced woman, additionally, 'a reasonable and fair provision', the relief of recovery of dower and return of marital gifts.

12. The important Section in the Act, 1986 is Section 3 which provides that a divorced woman is entitled to obtain from her former husband "maintenance", "reasonable and fair Provision" and "Mahr" etc. Section 3(1)(a) and Section 3(2) of the Muslim Women's Protection Act read as under:-

"3. Mahr or other properties of Muslim woman to be given to her at the time of divorce.-(1) Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to-

(a) a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband;

(2) Where a reasonable and fair provision and maintenance or the amount of mahr or dower due has not been made or paid or the properties referred to in clause (d) of sub-section (1) have not been delivered to a divorced woman on her divorce, she or any one duly authorised by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, mahr or dower or the delivery of properties, as the case may be."

After the enforcement of the Muslim Women's Protection Act, a divorced Muslim woman is entitled to maintenance not only for the period of iddat from her former husband but also to a reasonable and fair provision for her future. The wordings of Section 3 of the Act indicate that the husband has two separate and distinct obligations: (1) to make a "reasonable and fair provision" for his divorced wife; and (2) to provide "maintenance" for her. Section 3 of the Act prescribes forum for redress and the manner in which the order is to be executed. The Act confers exclusive jurisdiction on the Magistrate of the First Class to entertain an application under the Act by a Muslim woman where she resides.

13. In *Danial Latifi and another v. Union of India*, (2001) 7 SCC 740, the Constitution Bench of the Supreme Court considered the constitutional validity of the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 and upheld the validity of the provisions of the Act and held as under:-

"27. Section 3(1) of the Act provides that a divorced woman shall be entitled to have from her husband, a reasonable and fair maintenance which is to be made and paid to her within the iddat period. Under Section 3(2) the Muslim divorcee can file an application before a Magistrate if the former husband has not paid to

her a reasonable and fair provision and maintenance or mahr due to her or has not delivered the properties given to her before or at the time of marriage by her relatives, or friends, or the husband or any of his relatives or friends. Section 3(3) provides for procedure wherein the Magistrate can pass an order directing the former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may think fit and proper having regard to the needs of the divorced woman, standard of life enjoyed by her during her marriage and means of her former husband. The judicial enforceability of the Muslim divorced woman's right to provision and maintenance under Section 3(1) (a) of the Act has been subjected to the condition of the husband having sufficient means which, strictly speaking, is contrary to the principles of Muslim law as the liability to pay maintenance during the iddat period is unconditional and cannot be circumscribed by the financial means of the husband. The purpose of the Act appears to be to allow the Muslim husband to retain his freedom of avoiding payment of maintenance to his erstwhile wife after divorce and the period of iddat."

.....

"29. The important section in the Act is Section 3 which provides that a divorced woman is entitled to obtain from her former husband "maintenance", "provision" and "mahr", and to recover from his possession her wedding presents and dowry and authorizes the Magistrate to order payment or restoration of these sums or properties. The crux of the matter is that the divorced woman shall be entitled to a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband. The wordings of Section 3 of the Act appear to indicate that the husband has two separate and distinct obligations: (1) to make a "reasonable and fair provision" for his divorced wife; and (2) to provide "maintenance" for her. The emphasis of this section is not on the nature or duration of any such "provision" or "maintenance", but on the time by which an arrangement for payment of provision and maintenance should be concluded, namely, "within the iddat period". If the provisions are so read, the Act would exclude from liability for post-iddat period maintenance to a man who has already discharged his obligations of both "reasonable and fair provision" and "maintenance" by paying these amounts in a lump sum to his wife, in addition to having paid his wife's mahr and restored her dowry as per Sections 3(1)(c) and 3(1) (d) of the Act."

30. A comparison of these provisions with Section 125 CrPC will make it clear that requirements provided in Section 125 and the purpose, object and scope thereof being to prevent vagrancy by compelling those who can do so to support those who are unable to support themselves and who have a normal and legitimate claim to support are satisfied. If that is so, the argument of the petitioners that a different scheme being provided under the Act which is equally or more beneficial on the interpretation placed by us from the one provided under the Code of Criminal Procedure deprive them of their right, loses its

significance. The object and scope of Section 125 CrPC is to prevent vagrancy by compelling those who are under an obligation to support those who are unable to support themselves and that object being fulfilled, we find it difficult to accept the contention urged on behalf of the petitioners." [Underlining added]

The Constitution Bench upheld the provisions of the Act. But the Constitution Bench did not authoritatively decide on the question whether the Family Court would have jurisdiction to entertain an application filed by a divorced Muslim Woman for maintenance under the provisions of the Muslim Women Protection Act.

14. Under Section 3(1)(a) of the 1986 Act, a divorcee is entitled to get a reasonable and fair provision and maintenance to be made and paid to her within the iddat period. On construing the expression, "a fair and reasonable provision and maintenance" as used in Section 3(1)(a) of the 1986 Act, the Supreme Court in Danial Latifi case has summed up its conclusion as under:-

"36. While upholding the validity of the Act, we may sum up our conclusions:

(1) A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(a) of the Act.

(2) Liability of a Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to the iddat period.

(3) A divorced Muslim woman who has not remarried and who is not able to maintain herself after the iddat period can proceed as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim law from such divorced woman including her children and parents. If any of the relatives being unable to pay maintenance, the Magistrate may direct the State Wakf Board established under the Act to pay such maintenance.

(4) The provisions of the Act do not offend Articles 14, 15 and 21 of the Constitution of India."

15. Section 3 of 1986 Act opens with the words "notwithstanding anything contained in any other law for the time being in force," a divorced woman shall be entitled to rights enumerated in clauses (a) to (d) of Section 3(1) of 1986 Act. Muslim Women Protection Act may have conferred more rights but the Act confers these rights notwithstanding anything contained in Section 125 Cr.P.C. The non-obstante clause has to be understood fairly and reasonably. The non-obstante clause cannot be lightly assumed to bring in the effect of supersession. It should not be allowed to demolish or extinguish the existing right unless the legislative intention is clear, manifest and unambiguous. In *Shabana Bano v. Imran Khan* (2010) 1 SCC 666, the Supreme Court quashed the order of the

Family Court holding that even if the Muslim wife had been divorced during the period her application for maintenance is pending, she would be entitled to claim maintenance from her husband under Section 125 Cr.P.C. So, the case has been remanded to Family Court for disposal of the case on its merits in accordance with law.

16. We may also refer to Section 5 of the Muslim Women's Protection Act which gives divorced Muslim couples "an option to be governed by the provisions of Sections 125 to 128 of the Code of Criminal Procedure, 1973" which they could jointly exercise at the first hearing of the case under the Act. Section 5 of the Act enables the parties at the stage of first hearing, to withdraw from the applicability of the Muslim Women's Protection Act and be governed by the provisions of Criminal Procedure Code. Under Section 5 of the Muslim Women Protection Act, on the date of the first hearing, a divorced woman and her former husband can declare that they prefer to be governed by Sections 125 to 128 of the Code and then the Magistrate has to dispose of the application accordingly. Otherwise, the Magistrate has to deal with the application as per the provisions of the Muslim Women Protection Act. Section 7 of the Muslim Women Protection Act deals with Transitional Provisions. As per Section 7 of the Act, an application by a divorced woman under Section 125 or under Section 127 of the Code pending before a Magistrate on the commencement of Muslim Women Protection Act, shall, notwithstanding anything contained in that Code, subject to the provisions of Section 5 of the Act, shall be disposed of by such Magistrate in accordance with the provisions of the Muslim Women Protection Act. This makes the legal provision very clear. That is only a Magistrate of the First Class exercising jurisdiction under the Code can dispose of the application in accordance with the provisions of the Muslim Women Protection Act.

17. The Family Courts Act, 1984 was enacted in public interest for the establishment of Family Courts for the speedy settlement of family disputes and it came into force on 14.09.1984. The jurisdiction of Family Courts is provided for in Section 7 of the Act.

Sections 7 and 8 of the Act read as under:-

"7. Jurisdiction. - (1) Subject to the other provisions of this Act, a Family Court shall -

(a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.

Explanation. - The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely: -

(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;

(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

(d) a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship;

(e) a suit or proceeding for a declaration as to the legitimacy of any person;

(f) a suit or proceeding for maintenance;

(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise -

(a) the jurisdiction exercisable by a Magistrate of the first class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and

(b) such other jurisdiction as may be conferred on it by any other enactment.

18. Section 7(1)(a) of the Family Courts Act confers the entire jurisdiction hitherto exercised by any district court or any subordinate civil court in suits or proceedings relating to matters mentioned in clauses (a) to (g) of the Explanation. Sub-clause (b) creates a legal fiction endowing upon the Family Courts the status of the District Court or subordinate Civil Court. Section 7(1) can apply only when:- (i) the suit or proceeding is of the nature envisaged by clauses (a) to (g) of the Explanation; and (ii) concerning the matter where the jurisdictions are exercisable by any District Court or Subordinate Court. On these counts, the application under Section 3 of Muslim Women's Protection Act cannot be said to be covered by Section 7(1) of the Act. As provided in Section 3(2) of Muslim Women's Protection Act, application can be moved only before the First Class Magistrate having jurisdiction in the area under Criminal Procedure Code. Thus, an application under Section 3 of the Act cannot be maintained before the Family Court under Section 7(1) of the Family Courts Act.

19. Section 7(2)(a) confers jurisdiction upon the Family Court hitherto exercisable by a First Class Magistrate under Chapter IX (relating to order for maintenance of wife, children and parents) of the Criminal Procedure Code. Sub-section (2)(a) of Section 7 of the Family Courts Act confers limited jurisdiction upon the Family Court relating to those matters only as are covered under Chapter IX of Criminal Procedure Code. Section 7(2)(b) however relates to conferment of any additional jurisdiction on the Family Courts by other enactments. This provision is in the nature of an enabling provision by which

legislature can enlarge the Court's jurisdiction by conferring additional jurisdiction.

20. The expression "conferred on it" occurring in sub-clause (b) of Section 7(2) speaks of conferment of the jurisdiction on the Family Court by an enactment. Thus, under Section 7(2)(b), the jurisdiction must be specifically conferred and cannot be assumed or deemed to have been conferred. The provisions of the Muslim Women's Protection Act do not confer any jurisdiction on the Family Court. As pointed out earlier, Section 3(2) of the Muslim Women's Protection Act provides that the application may be made to a Magistrate; but not to the Family Court. The Muslim Women's Protection Act was enacted in 1986 subsequent to the Family Courts Act, 1984. In the light of the provisions, under Section 3(2) of the Muslim Women's Protection Act especially conferring jurisdiction upon the First Class Judicial Magistrate, the application under Section 3 can lie only to the Magistrate having jurisdiction in the area.

21. Considering the provisions of Section 3 of Muslim Women's Protection Act vis-à-vis the provisions of the Family Courts Act in *Anjum Hasan Siddiqui v. Smt. Salma B.* AIR 1992 All 322, the learned Single Judge of the Allahabad High Court held as under:-

"8. Apart from the above no application under Section 3 lies to the district court or sub-ordinate civil court. As provided in Section 3(2) of 1986 Act, the application can be moved before the first class Magistrate having jurisdiction in the area under the Cr.P.C. Thus, Section 7(1) does not help the respondent at all.

9. Sub-clause (2) of Section 7 of the Family Court Act is also of no help to the respondent since the Act confers only a limited jurisdiction relating to those matters only as are covered by Chapter IX of the Criminal P.C. Only this limited jurisdiction has been transferred to the Family Court. To this extent alone, the first Class Magistrate having jurisdiction in the area for which Family Court has been established loses his jurisdiction which is thence forth exercisable by the Family Court only.

10. Thus, we have seen that neither under sub-section (1) nor under sub-section (2) of Section 7 the Family Court's Act has any jurisdiction to entertain an application of the nature contemplated by Section 3 of the 1986 Act.

11. Faced with such a situation the learned counsel for the respondent turned to sub-sec. (2)(b). He urged that jurisdiction may be deemed to have been conferred on the Family Court under this provision. We are afraid, the learned counsel is again on a weak ground. The words 'conferred on it' in sub-clause (b) speaks of conferment of jurisdiction on the Family Court by an enactment. The jurisdiction must be specifically conferred and cannot be assumed to have been conferred. No provisions of 1986 Act however, confers any such jurisdiction on the Family Court. On the other hand Section 3(2) of the 1986 Act provides that the application may be made to a Magistrate and not to the Family Court. Apart from this the 1986 Act was enacted subsequent to the Family Court Act and its

provisions supersedes all earlier enactments. Hence this section must prevail over the Family Courts Act, 1984. Thus an application under Section 3 can lie only to the Magistrate having jurisdiction in the area.

12. Section 3 of the 1986 Act itself recognises rights of divorced Muslim Woman, prescribes a forum for redress thereof and prescribes the manner of execution of the order made in that behalf. This makes the Act complete in itself and does not depend for support on any other enactment. The section begins with a non-obstante clause and it overrides all other provisions of the then existing laws. All provisions contrary to what is contained in S-. 3 of 1986 Act, including the Family Courts Act , 1984, shall stand superseded by its provision. A comparison of the provisions of 1984 and 1986 Acts would also show that the purpose and scope of the two Acts is somewhat different. Section 3 is only limited to certain claims enumerated therein which alone can be put forward by a divorced Muslim Woman under the Act in the manner prescribed....." (Underlining added)

22. The question whether the Family Court has jurisdiction to try application of the Muslim divorced woman for maintenance after coming into force the Muslim Women's Protection Act, was considered by the Full Bench of Bombay High Court in Karim Abdul Rehman Shaikh v. Shehnaz Karim Shaikh and others 2000 (3) Mh.L.J. 555 which also took the same view that a Muslim woman can apply under Sections 3 and 4 of the Muslim Women's Protection Act only to the First Class Magistrate having jurisdiction under the Code and the Family Court cannot deal with such applications and held as under:-

"61. It is important to note that there is no enactment containing an express provision that the Family Court shall have jurisdiction to deal with applications made by a divorced Muslim women under sections 3 and 4 of the Muslim Women Act. On the contrary, the scheme of the Muslim Women Act shows that such application can be made only to the Magistrate of First Class exercising jurisdiction under the Code. The Family Court's Act is a prior enactment. Muslim Women Act does not even refer to the Family Court's Act. If it was the intention of the legislature to see that a Muslim women can file application before a Family Court an express provision to that effect would have been found in the Muslim Women Act . On the contrary, under section 5 of the Muslim Women Act, a divorced women and her former husband can declare that they prefer to be governed by sections 125 to 128 of the Code and then the Magistrate has to dispose of the application accordingly. Otherwise, the Magistrate has to deal with it as per the provisions of the Muslim Women Act . There is no provision under which a Muslim women can prefer to go to a Family Court by making a joint declaration with her husband. Section 7 says that application by a divorced women under section 125 or under section 127 of the Code pending before a Magistrate on the commencement of the Muslim Women Act shall notwithstanding anything contained in that Code and subject to the provisions of section 5 of the Muslim Women Act shall be disposed of by such Magistrate in accordance with the provisions of the Muslim Women Act. This makes the legal

provision very clear. It is only a Magistrate of the First Class exercising jurisdiction under the Code who can dispose of even the pending applications and that too in accordance with the provisions of the Muslim Women Act. Therefore, there is nothing in the provisions of the Muslim Women Act to suggest that the Family Court has jurisdiction to entertain applications under sections 3 and 4 of the Muslim Women Act.

62. Similar view has been taken by Division Bench of this Court in Noor Jamaal's case (supra) and we respectfully concur with the said view. We do not concur with decision of the Division Bench of this Court in Allabuksh's case (supra) which holds that, where a Family Court has been established, the power and jurisdiction of the Family Court to entertain an application by a divorced Muslim wife is not taken away expressly or by necessary implication by the Muslim Women Act and the remedy under the Muslim Women Act is an additional remedy. In our opinion, the fact that the Muslim Women Act does not refer to a Family Court or does not say that application under sections 3 and 4 can be filed before the Family Court is very material. If the jurisdiction of the Family Court was sought to be protected, there would have been an express provision making it clear that the Family Court has jurisdiction to entertain applications of divorced Muslim women under sections 3 and 4 of the Muslim Women Act. We therefore hold that after coming into force of the Muslim Women Act, a Muslim women can apply under sections 3 and 4 of the said Act only to the First Class Magistrate having jurisdiction under the Code. The Family Court cannot deal with such applications." [Underlining added]

23. In the present case, we are concerned with the question whether the application under Section 3(2) of the Act of 1986 can be filed before the Family Court or whether the Family Court can convert the petition for maintenance under Section 125 Cr.P.C. to one under Section 3 or Section 4 of the Act of 1986. I fully agree with the view taken by the Full Bench of the Bombay High Court in Karim Abdul Rehman Sheikh case. Since the Muslim Women's Protection Act, 1986 does not refer to the Family Court or does not say that an application under Sections 3 and 4 can be filed before the Family Court, in my view, the Family Court cannot entertain the application of divorced Muslim woman under Sections 3 and 4 of the Muslim Women's Protection Act, 1986.

24. The learned counsel for the appellant placed reliance upon the judgment in Iqbal Bano case and submitted that in the said case, the Magistrate has converted the petition for maintenance under Section 125 Cr.P.C. to the application under Section 3 of the Muslim Women's Protection Act, 1986 and the same was upheld by the Supreme Court. The facts of the Iqbal Bano case are clearly distinguishable from the facts of the present case. In Iqbal Bano case, the application under Section 125 Cr.P.C. was made before the Magistrate which also had jurisdiction to entertain application under Section 3 of the Muslim Women's Protection Act. In that context, the Supreme Court upheld the order converting the application under Section 125 Cr.P.C. as the one under Section 3 of the

Muslim Women's Protection Act.

25. Therefore, the application under Section 3(2) of the Act of 1986 by the divorced wife has to be filed before the competent Magistrate having jurisdiction if she claims maintenance beyond the iddat period. Even if the Family Court has been established in that area, the Family Court not having been conferred the jurisdiction under Section 7 of the Family Courts Act, 1984 to entertain an application filed under Section 3 of the Muslim Women Protection Act, the Family Court shall have no jurisdiction to entertain an application under Section 3(2) of the Act of 1986. The Family Court, therefore, cannot convert the petition for maintenance under Section 125 Cr.P.C. to one under Section 3 or Section 4 of the Act of 1986. The High Court, in my view, rightly held that the Family Court has no jurisdiction to entertain the petition under Sections 3 and 4 of the Act of 1986 and that the Family Court cannot convert the petition for maintenance under Section 125 Cr.P.C. to one under Section 3 or Section 4 of the Act of 1986. I do not find any reason warranting interference with the impugned order.

26. In the result, the appeal is dismissed. The High Court has given liberty to appellant No.1 to file application under Section 3 of the Act of 1986 before the competent Magistrate. The application if any already filed by the appellant No.1 or any application to be filed before the competent Magistrate of the First Class shall be heard and disposed of as expeditiously as possible. The Magistrate of the First Class shall not be influenced by any of the views expressed by this Court or by the High Court and shall consider the matter on its own merits.

Indira Banerjee, J

1. I have gone through the judgment prepared by my esteemed sister, but I have not been able to persuade myself to agree that a Family Court constituted under the Family Courts Act, 1984, lacks jurisdiction to convert an application for maintenance filed by a Muslim woman under Section 125 of the Code of Criminal Procedure 1973 (hereinafter referred to as "Cr.P.C") to an application under Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986, (hereinafter referred to as the "1986 Act for Muslim Women"), and decide the same.

2. The facts giving rise to this appeal, have been narrated by my esteemed sister and are not repeated to avoid prolixity.

3. The Family Courts Act, 1984 has been enacted to provide for the establishment of Family Courts inter alia with a view to secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith.

4. The Statement of Objects and Reasons for enactment of the Family Courts Act records that several associations of women, other organizations and individuals from time to time, demanded that Family Courts be set up for the settlement of family disputes, where emphasis should be laid on conciliation and achieving

socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated.

5. The Law Commission had, in its 59th Report submitted in 1974, stressed that in dealing with disputes concerning the family, the Court ought to adopt an approach, radically different from that adopted in ordinary civil proceedings, and that it should make reasonable efforts at settlement before the commencement of the trial. In 1976, the Code of Civil Procedure was amended to provide for a special procedure to be adopted in suits and proceedings relating to matters concerning the family.

6. Parliament enacted the Family Courts Act to provide for establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of disputes relating to marriage and family affairs, and matters connected therewith.

7. The Family Courts Act is a secular statute, which applies to matters contemplated therein, irrespective of the religion of the litigating parties. Section 3 of the Family Courts Act provides for establishment of Family Courts, after consultation with the High Court.

8. The Family Courts established under Section 3 of the Family Courts Act, derive jurisdiction from Section 7 of the said Act which is set out hereinbelow for convenience:-

"7. Jurisdiction

(1) Subject to the other provisions of this Act, a Family Court shall-

(a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.

Explanation.-The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:-

(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

(d) a suit or proceeding for an order or injunction in circumstance arising out of a marital relationship;

- (e) a suit or proceeding for a declaration as to the legitimacy of any person;
- (f) a suit or proceeding for maintenance;
- (g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise-

(a) the jurisdiction exercisable by a Magistrate of the first class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and

(b) such other jurisdiction as may be conferred on it by any other enactment."

9. Section 8 of the Family Courts Act provides :-

'Exclusion of jurisdiction and pending proceedings. Where a Family Court has been established for any area,-

(a) no district court or any subordinate civil court referred to in sub-section (1) of section 7 shall, in relation to such area, have or exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in the Explanation to that sub-section;

(b) no magistrate shall, in relation to such area, have or exercise any jurisdiction or powers under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974);

(c) every suit or proceeding of the nature referred to in the Explanation to sub-section (1) of section 7 and every proceeding under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974),-

(i) which is pending immediately before the establishment of such Family Court before any district court or subordinate court referred to in that sub-section or, as the case may be, before any magistrate under the said Code; and

(ii) which would have been required to be instituted or taken before such Family Court if, before the date on which such suit or proceeding was instituted or taken, this Act had come into force and such Family Court had been established,

shall stand transferred to such Family Court on the date on which it is established."

10. On a reading of Section 7(1) along with explanation (f) to Section 7(1) of the Family Courts Act, it is patently clear that the Family Court, established under Section 3 of the Family Courts Act, is clothed with the jurisdiction and powers exercisable by a District Court or any Subordinate Civil Court, under any law for the time being in force, to entertain and decide any suit or proceeding for maintenance, which would include an application under Section 3 of the 1986 Act for Muslim Women.

11. A Family Court, constituted for adjudication of family disputes, is quite different from the regular Criminal and Civil Courts. The atmosphere in these Courts is much more informal and far less intimidating than the atmosphere in regular Civil and Criminal Courts. These Courts are not bound by rules of evidence and rules of procedure. The Family Courts have the power to devise their own procedure for adjudication of family disputes.

12. Section 5 of the Family Courts Act contemplates association with Family Courts, of social welfare organizations, persons professionally engaged in promoting welfare of the family, persons working in the field of social welfare and any other persons, whose association with the Family Court, would enable it to exercise its jurisdiction more effectively, in accordance with the purposes of the Family Courts Act.

13. Section 6 of the Family Courts Act provides for appointment, inter alia, of counsellors to assist a Family Court, in the discharge of its functions, and Section 9 of the Family Courts Act casts a duty on the Family Courts to endeavour, wherever it is possible, to assist and persuade the parties in arriving at a settlement in respect of the subject matter of the suit or proceeding, and for this purpose a Family Court may, subject to any rules made by the High Court, follow such procedure as it may deem fit. Unlike a Criminal Court or a Civil Court, a Family Court is obliged to adjourn proceedings, whenever there is reasonable possibility of settlement between the parties.

14. The Family Court is to be deemed to be a Civil Court and have all the powers of such Court under Section 10 of the Family Courts Act, and subject to the other provisions of the Family Courts Act and the Rules made thereunder, the provisions of the Civil Procedure Code, 1908 (hereinafter referred to as 'CPC') apply to suits and proceedings before the Family Court, except for proceedings under Chapter IX of the Cr.P.C.

15. Notwithstanding sub-section (1) and sub-section (2) of Section 10 of the Family Courts Act, which makes the provisions of the CPC applicable to suits and proceedings before the Family Court, other than those under Chapter IX of the Cr.P.C., and the provisions of the Cr.P.C. applicable to all the proceedings under Chapter IX of that Code, it is open to the Family Court to lay down its own procedure with a view to arrive at a settlement in respect of the subject matter of the suit or proceeding.

16. Section 12 of the Family Courts Act envisages the assistance inter alia of professional experts in the field of family welfare, whether or not related to the parties, to assist the Family Courts in discharging their functions imposed by the Family Courts Act.

17. An important facet of the Family Courts Act is Section 13 of the said Act, which provides that notwithstanding anything contained in any law, no party to any suit or proceedings before a Family Court, shall be entitled as of right, to be represented by a legal practitioner. If the Family Court considers it necessary in

the interest of justice, it may seek the assistance of a legal expert as *amicus curiae*. In this country, women are, by and large, economically weaker. In the regular Civil and Criminal Courts, economically weak applicants, unable to afford lawyers of standing could be pitted against the best legal brains hired by financially strong opponents. However, in proceedings for maintenance in the Family Court, the parties are equally poised, with the same standard of legal representation.

18. Another significant feature of the Family Courts Act is Section 14, which enables a Family Court to receive as evidence, any report, statement, document, information or matter that may in its opinion help to deal effectively with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872.

19. Under Section 16 of the Family Courts Act, the evidence of any person which is of a formal character, may be given by affidavit, and subject to just exceptions, be read in evidence in any suit or proceedings before a Family Court.

20. Therefore, in proceedings for maintenance, in a Family Court, Certificates, Documents etc. issued by Authorities/Employers etc. may be proved by affidavits, without requiring presence in Court of disinterested witnesses, whose failure and/or inability to appear in Court on the dates of hearing often delays the proceedings.

21. Section 18 of the Family Courts Act makes a decree or order other than an order under Chapter IX of the Cr.P.C. executable in the same manner as a decree of a Civil Court, as prescribed by the CPC. An order under Chapter IX of the Cr.PC may be executed in the manner prescribed for the execution of such order by the Cr.PC

22. Where a Family Court has been established for any area, Section 8 of the Family Courts Act denudes the District Court or any Subordinate Civil Court referred to in sub-section (1) of Section 7 of jurisdiction in respect of any suit or proceeding of the nature referred to in the Explanation to that sub-section.

23. Section 8(b) of the Family Courts Act prohibits any Magistrate from exercising jurisdiction or powers under Chapter IX of the CR.P.C. in relation to any area for which a Family Court has been established.

24. It is important to note that Section 20 of the Family Courts Act, with its non-obstante clause gives the provisions of the Family Courts Act overriding effect, over any other law, which would include the 1986 Act for Muslim Women. The Family Courts Act is to have effect, notwithstanding anything inconsistent therewith, contained in any other law, for the time being in force, or in any instrument having effect, by virtue of any law other than the Family Courts Act.

25. The non-obstante clause in Section 20 makes the legislative intent in enacting the Family Courts Act absolutely clear. The provisions of the Act are to have effect, notwithstanding anything inconsistent in any other law for the time

being in force. In my view, the expression "in any other law, for the time being in force", cannot be construed narrowly to mean a law which was in force on the date of enactment and/or enforcement of the Family Courts Act, as sought to be argued by Counsel appearing on behalf of the respondent. The expression "any other law for the time being in force" would include subsequently enacted laws, in force, as long as Section 20 of the Family Courts Act is in operation.

26. On a reading of Sections 7(1) and 7(2) of the Family Courts Act, it is patently clear that a Family Court is deemed to be a District Court, or as the case may be Subordinate Civil Court, in the area to which the jurisdiction of the Family Court extends, in respect of proceedings of the nature, referred to in the Explanation to Section 7(1) and is to be deemed to be the Court of a Magistrate of the First class for the purpose of exercising jurisdiction under Chapter IX of the Cr.P.C. Proceedings for maintenance are essentially civil proceedings.

27. As observed above, the Family Courts have jurisdiction in respect of the matters specified in the Explanation (f) of Section 7(1), irrespective of religion or faith of the parties to the litigation. Wherever a Family Court is constituted, such Family Court not only exercises the jurisdiction and powers of any District Court or Subordinate Civil Court in respect of suits and other proceedings of the nature referred to in the Explanation (f) to Section 7(1), that is, suits and other proceedings for maintenance, it also exercises the jurisdiction and powers of a Magistrate of the First Class under Chapter IX of the Cr.P.C.

28. The relevant provisions of Chapter IX of the Cr.P.C. are set out hereinbelow for convenience:

"CHAPTER IX

ORDER FOR MAINTENANCE OF WIVES, CHILDREN AND PARENTS

125. Order for maintenance of wives, children and parents.- (1) If any person having sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child, is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct;

...

Explanation.- For the purposes of this Chapter,-

(a) "minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875) is deemed not to have attained his majority;

(b) "wife includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

....

126. Procedure.- (1) Proceedings under section 125 may be taken against any person in any district-

(a) where he is, or

(b) where he or his wife, resides, or

(c) where he last resided with his wife, or as the case may be, with the mother of the illegitimate child.

(2) All evidence in such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is proceeded to be made, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed for summons- cases:

Provided that if the Magistrate is satisfied that the person against whom an order for payment of maintenance is proposed to be made is wilfully avoiding service, or wilfully neglecting to attend the Court, the Magistrate may proceed to hear and determine the case ex parte and any order so made may be set aside for good cause shown on an application made within three months from the date thereof subject to such terms including terms as to payment of costs to the opposite party as the Magistrate may think just and proper.

(3) The Court in dealing with applications under section 125 shall have power to make such order as to costs as may be just.

127. Alteration in allowance.-.....

128. Enforcement of order of maintenance.- A copy of the order of [maintenance or interim maintenance and expenses of proceeding, as the case may be,] shall be given without payment to the person in whose favour it is made, or to his guardian, if any or to the person to [whom the allowance for the maintenance or the allowance for the interim maintenance and expenses of proceeding, as the case may be,] is to be paid; and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non- payment of the [allowance, or as the case may be, expenses, due]."

29. The right to equality, irrespective of religion, is a basic human right, recognized, reaffirmed and reiterated in the Universal Declaration of Human Rights adopted by the United Nations on December 10, 1948. Article 2 of the

declaration reads:

"Article 2 : Everyone is entitled to all the rights and freedoms set forth in the declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

30. The International Covenant for Civil and Political Rights (ICCPR) obligates the state parties to ensure equal right of women to enjoyment of all rights mentioned in each of the covenants. This right is irrespective of religion. Article 14 of the ICCPR mandates "All persons shall be equal before the Courts and Tribunals" and Article 26 declares that "all persons are equal under the law and are entitled without any discrimination, to equal protection of the law...".

31. The Convention on the Elimination of All Forms of Discrimination against Women 1979, commonly referred to as CEDAW, recognizes amongst others, the right of women to equality irrespective of religion, as a basic human right. Article 2 of CEDAW exhorts State Parties to ensure adoption of a woman friendly legal system and woman friendly policies and practices.

32. As a signatory to the CEDAW, India is committed to adopt a woman friendly legal system and woman friendly policies and practices. The 1986 Act for Muslim Women, being a post CEDAW law, this Court is duty bound to interpret the provisions of the said Act substantively, liberally, and purposefully, in such a manner as would benefit women of the Muslim community.

33. Under the Indian Constitution, the right to equality is a fundamental right. All persons are equal before the law and are entitled to equal protection of the laws, be it substantive law or procedural law. Article 15 of the Constitution of India clearly prohibits discrimination on grounds, inter alia, of religion or sex.

34. The competing and conflicting principles of religious freedom of citizens and gender equality for women, has posed a major challenge to the judiciary in India. Personal laws of the Muslims, which are governed by the Shariat law, are protected under the umbrella of religious freedom and therefore immune from challenge on the ground of violation of any fundamental right or other constitutional right. Procedural laws would not, however, enjoy the same immunity to challenge which substantive Muslim Personal Laws enjoy.

35. Section 125 of the Cr.P.C. is a beneficial piece of legislation, specially enacted as a measure of social justice, the dominant purpose whereof is to ensure that a wife including a divorced wife, a child or a parent is not driven to penury and vagrancy. The Section provides a simple speedy remedy, inter alia, for a wife including a divorced wife, who is neglected by her husband/ex husband, even though he has sufficient means to maintain her. Such a wife or divorced wife can obtain an order of maintenance from a Magistrate.

36. Proceedings under Section 125 of the Cr.P.C. are of a civil nature, as held by this Court in *Vijay Kumar Prasad v. State of Bihar* (2004) 5 SCC 196. There is no

penal provision for neglect and/or failure to maintain a wife or a divorced wife. However, non compliance of an order of maintenance attracts the penal provisions of the Cr.P.C. In *Zohara Khatoon and Anr. v. Mohd. Ibrahim* (1981) 2 SCC 509, this Court held that wife includes a woman who has obtained a decree for dissolution of marriage under the Dissolution of Muslim Marriages Act, 1939.

37. In *Md. Ahmed Khan v. Shah Bano Begum and Others* (1985) 2 SCC 556, this Court held that Section 125 of the Cr.P.C, which obliges a husband to pay maintenance to his wife, including a divorced wife, cannot be overridden by the personal laws of the Muslims.

38. This Court held that although Muslim law limits the husband's liability to provide for maintenance of the divorced wife to the period of iddat, it would be unjust to extend this principle of Muslim law to a case, where a divorced wife is unable to maintain herself, in which case she could have recourse to Section 125 of the Cr.P.C. Unfortunately, the aforesaid judgment led to protests, from a section of the Muslim community, after which Parliament enacted the 1986 Act for Muslim Women, which nullified the effect of the judgment of this Court in the *Shah Bano Case* (supra).

39. The 1986 Act for Muslim Women has been enacted to protect the rights of Muslim women who have been divorced by, or have obtained divorce from, their husbands and to provide for matters connected therewith or incidental thereto.

40. Section 3 of the 1986 Act for Muslim Women provides:-

"Section 3. Mahr or other properties of Muslim woman to be given to her at the time of divorce.

(1) Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to

(a) a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband;

(b) where she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children;

(c) an amount equal to the sum of mahr or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim law; and

(d) all the properties given to her before or at the time of marriage or after her marriage by her relatives or friends or the husband or any relatives of the husband or his friends.

(2) Where a reasonable and fair provision and maintenance or the amount of mahr or dower due has not been made or paid or the properties referred to in clause (d) of sub-section (1) have not been delivered to a divorced woman on

her divorce, she or any one duly authorised by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, mahr or dower or the delivery of properties, as the case may be.

(3) Where an application has been made under sub-section (2) by a divorced woman, the Magistrate may, if he is satisfied that- (a) her husband having sufficient means, has failed or neglected to make or pay her within the iddat period a reasonable and fair provision and maintenance for her and the children; or (b) the amount equal to the sum of mahr or dower has not been paid or that the properties referred to in clause (d) of sub-section (1) have not been delivered to her, 3 make an order, within one month of the date of the filing of the application, directing her former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may determine as it and proper having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of her former husband or, as the case may be, for the payment of such mahr or dower or the delivery of such properties referred to in clause (d) of sub-section (1) the divorced woman: Provided that if the Magistrate finds it impracticable to dispose of the application within the said period, he may, for reasons to be recorded by him, dispose of the application after the said period.

(4) If any person against whom an order has been made under sub-section (3) fails without sufficient cause to comply with the order, the Magistrate may issue a warrant for levying the amount of maintenance or mahr or dower due in the manner provided for levying fines under the Code of Criminal Procedure, 1973 (2 of 1974), and may sentence such person, for the whole or part of any amount remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one year or until payment if sooner made, subject to such person being heard in defence and the said sentence being imposed according to the provisions of the said Code.

41. Under Section 3(1) of the 1986 Act for Muslim Women, a divorced Muslim woman would be entitled to (a) a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband; (b) where she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children; (c) an amount equal to the sum of mahr or dower agreed to be paid to her at the time of her marriage, or at any time thereafter, according to Muslim law; and (d) to all the properties given to her before or at the time of marriage or after her marriage by her relatives or friends or the husband or any relatives of the husband or his friends.

42. Section 3(1) of the 1986 Act for Muslim Women, starts with a non obstante clause. The non-obstante clause in Section 3(1) gives overriding effect to the substantive provisions of Section 3(1) of 1986 Act for a Muslim women. A divorced Muslim woman would be entitled to maintenance in accordance with

Section 3(1) of the 1986 Act for Muslim Women, notwithstanding anything contained in any other law in force, including Sections 125 to 128 of the Cr.P.C. The non-obstante clause is restricted in its application to sub section (1) of Section 3. It does not apply to sub-Sections (2) and (3) of the 1986 Act for Muslim Women.

43. Section 2(c) of the 1986 Act for Muslim women defines "Magistrate to mean Magistrate of the First Class, exercising jurisdiction under the Code of Criminal Procedure, 1973 in the area where the divorced woman resides".

44. Section 4 of the 1986 Act for Muslim Women, enabling the Magistrate to direct relatives to pay maintenance in certain circumstances, is not relevant for the purpose of this application. Section 5 which gives the option to the divorced woman and her husband to be governed by the provisions of Section 125 to 128 of the Cr.P.C., provided they give a declaration by affidavit, is also not attracted in this case, since the Respondent has not agreed to be governed by the provisions of Sections 125 to 128 of the Cr.P.C.

45. Section 7 provides that every application by a divorced Muslim woman under Section 125 or Section 127 of the Cr.P.C., pending before a Magistrate at the time of commencement of the 1986 Act for Muslim Women shall, notwithstanding anything contained in that Code, and subject to the provisions of Section 5 of the 1986 Act for Muslim Women, of exercising option to be governed by the aforesaid provisions of the Code, be disposed by the Magistrate in accordance with the provisions of 1986 Act for Muslim women.

46. In this case, the appellant made an application under Section 125 of Cr.P.C. claiming maintenance as wife. In course of the proceedings, it transpired that the appellant's husband had divorced her by the 'Triple Talaq' method, after which the application of the appellant was treated as an application under Section 3 of the 1986 Act for Muslim Women. It may be pertinent to note that divorce by the 'Triple Talaq' is no longer valid, after enactment of the Muslim Women (Protection of Rights on Marriage) Act, 2019.

47. The question which arises for determination of this Court is, whether the 1986 Act for Muslim Women, particularly Section 3(2), 3(3), 3(4), 4(c), 4(2) and 7 thereof read with the definition of "Magistrate" in Section 2(c), impliedly bars the jurisdiction of the Family Court to entertain or decide an application filed by a divorced Muslim Woman for maintenance. A rigid, constricted reading of the 1986 Act for Muslim Women, to denude the Family Courts constituted under the Family Courts Act of jurisdiction to decide an application thereunder, is in my view impermissible in law.

48. There can be no dispute that the Family Court alone has jurisdiction in respect of personal and family matters relating to women and men, irrespective of their religion. Family matters of Muslim women pertaining inter alia to marriage, divorce etc. are decided by Family Courts, as also claims of Muslim wives to maintenance under Section 125 of the Cr.P.C. There could be no reason

to single out divorced Muslim wives to deny them access to the Family Courts, and that in my view, was never the legislative intent of the 1986 Act for Muslim Women.

49. Equality before the law and equal protection of the laws envisaged in Article 14 of the Constitution of India applies as much to procedural laws as to substantive laws. This proposition finds support from the judgment of this Court in *State of West Bengal v. Anwar Ali Sarkar* reported in AIR 1952 SC 75. Reference may also be made to the judgment of this Court in *D.K. Yadav v. J. M. A. Industries Ltd.* reported in (1993) 3 SCC 259 where this Court held:

"10. In *State of W.B. v. Anwar Ali Sarkar* per majority, a seven-Judge Bench held that the rule of procedure laid down by law comes as much within the purview of Article 14 of the Constitution as any rule of substantive law..."

50. In *Lachhman Dass v. State of Punjab* reported in AIR 1963 SC 222, a Constitution Bench of this Court accepted that Article 14 prohibited discriminatory legislation whether substantive or procedural. However, the majority found that Article 14 did not forbid reasonable classification and accordingly rejected a challenge to a law which provided a special procedure for the recovery of dues from the customers of State Bank. In *Lachhman Dass* (supra) the majority held:

"22....The law is now well settled that while Art.14 prohibits discriminatory legislation directed against one individual or class of individuals, it does not forbid reasonable classification, and that for this purpose even one person or group of persons can be a class. Professor Willis says in his *Constitutional Law* p.580 "a law applying to one person or one class of persons is constitutional if there is sufficient basis or reason for it..."

23. On the principles stated above we are of the opinion that the Patiala State Bank is a class by itself and it will be within the power of the State to enact a law with respect to it. We are also of the opinion that the differentia between the Patiala State Bank and the other Banks has a rational bearing on the object of the legislation. If the Funds of the Patiala State Bank are State Funds, a law which assimilates the procedure for the determination and recovery of amounts due to the Bank from its customers to that prescribed for the determination and recovery of arrears of revenue must be held to have a just and reasonable relation to the purpose of the legislation. A law which provides for State funds being advanced to customers through State Bank can also provide for its being recovered in the same manner as revenue...."

51. Subba Rao J., delivering a separate dissenting judgment held:

"51. It is also well settled that the guarantee of equal protection applies against substantive as well as procedural laws. Jennings in his *"Law of the Constitution"*, 3rd Edn., p.49 describes the idea of equality of treatment thus:..'

52. It is true that the view of Subba Rao J. was the minority view. However,

there was no difference between the majority and the minority with the proposition of law summarized by Subba J. as quoted above.

53. In *Meenakshi Mills v. Vishvanatha Sastri* reported in AIR 1955 SC 13, a Constitution Bench of this Court held:

"6. Article 14 of this Part guarantees to all persons the right of equality before the law and equal protection of the laws within the territory of India. This article not only guarantees equal protection as regards substantive laws but procedural laws also come within its ambit. The implication of the article is that all litigants similarly situated are entitled to avail themselves of the same procedural rights for relief, and for defence with like protection and without discrimination. The procedural provisions of Act 30 of 1947 had therefore to stand the challenge of Article 14 and could only be upheld provided they withstood that challenge."

54. In *Budhan Choudhry v. State of Bihar* reported in AIR 1955 SC 191, a seven Judge Constitution Bench of this Court decided a challenge to Section 30 of the Cr.P.C observing that:

"5. The provisions of Article 14 of the Constitution have come up for discussion before this Court in a number of cases, namely, *Chiranjit Lal Chowdhuri v. Union of India* [AIR 1951 SC 41], *State of Bombay v. F.N. Balsara* [AIR 1951 SC 318], *State of West Bengal v. Anwar Ali Sarkar* [AIR 1952 SC 75], *Kathi Raning Rawat v. State of Saurashtra* [AIR 1952 SC 123], *Lachmandas Kewalram Ahuja v. State of Bombay* [AIR 1952 SC 235] and *Qasim Razvi v. State of Hyderabad* [AIR 1953 SC 156] and *Habeeb Mohamad v. State of Hyderabad* [AIR 1953 SC 287]. It is, therefore, not necessary to enter upon any lengthy discussion as to the meaning, scope and effect of the article in question. It is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases; namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure. The contention now put forward as to the invalidity of the trial of the appellants has, therefore to be tested in the light of the principles so laid down in the decisions of this Court."

55. The non-obstante Clause in Section 3(1) of the 1986 Act for Muslim Women provides, in effect and substance, that a divorced Muslim woman would only be entitled to maintenance as provided in Section 3(1) of the 1986 Act for Muslim Women as enumerated hereinabove, notwithstanding any other law including

Section 125 of the Cr.PC.

56. It is now settled that a divorced Muslim woman cannot claim maintenance under Section 125 of the Cr.P.C. from her husband after the enactment of the 1986 Act for Muslim Women. However, under Section 3 read with Section 4 of the 1986 Act for Muslim Women, a divorced Muslim woman is entitled to an order of maintenance, if she is unable to maintain herself after the Iddat period and has not remarried. Section 5 of the 1986 Act for Muslim Women provides that a divorced woman and her former husband might decide by an affidavit or any other declaration in writing, that they would prefer to be governed by the provisions of Section 125 to 128 of the Cr.P.C.

57. The constitutional validity of the 1986 Act for Muslim Women has been upheld by this Court in *Danial Latifi and Another v. Union of India* (supra). There is however, no authoritative decision of this Court on the question of whether the Family Courts have jurisdiction to decide an application of a Muslim Woman for maintenance under the provisions of the 1986 Act for Muslim women.

58. As observed above Section 7 of the Family Courts Act expressly confers jurisdiction to a Family Court to exercise all jurisdiction exercisable by any District Court or any Subordinate Civil Court, under any law for the time being in force, in respect inter alia of all suits and proceedings for maintenance. The Family Court has also expressly been conferred with jurisdiction exercisable by a Magistrate of the First Class under Chapter IX of the Cr.P.C relating to maintenance. Under Section 7(2)(b) of the Family Courts Act, the Family Court may exercise such other jurisdiction as may be conferred on it by any other enactment.

59. The Family Courts Act, enacted long before enactment of the 1986 Act for Muslim Women, obviously did not contemplate the later legislation. There is, therefore, no specific mention of the 1986 Act for Muslim Women in the Family Courts Act.

60. Section 8 excludes the jurisdiction of District Court or Subordinate Civil Court in respect of any suit or proceeding of the nature referred to in the Explanation to sub-Section (1) of Section 7 and also excludes the jurisdiction of a Magistrate in relation to an application under Chapter IX of the Cr.P.C., once a Family Court is constituted with territorial jurisdiction coextensive with that of the District Courts or the Subordinate Civil Courts or the Courts of First Class Magistrates under Chapter IX of the Cr.P.C. There has not been any amendment in the Family Courts Act after enactment of the 1986 Act for Muslim Women to expressly confer jurisdiction on Family Courts in respect of proceedings under the 1986 Act for Muslim Women.

61. It has thus been argued on behalf of the Respondent that the Family Courts do not have the jurisdiction exercisable by a Magistrate of the First Class under the 1986 Act for Muslim Women, since the 1986 Act for Muslim Women, does not confer any such jurisdiction on the Family Courts, and Section 7 read with

Section 8 of the Family Courts Act only clothes the Family Court with the jurisdiction of the First Class Magistrate in respect of proceeding for maintenance under Chapter IX of the Cr.P.C.

62. If there is any ambiguity, with regard to the jurisdiction of the Family Court, by reason of use of the expression subordinate Civil Court in Section 7(1)(a) and (b) of the Family Courts Act and the specification of Magistrate of the First Class exercising jurisdiction under Chapter IX of the Cr.P.C. in Section 7(2)(a) thereof, this Court is duty bound to clear the ambiguity by interpreting the law in consonance with the fundamental rights conferred under Articles 14 and 15 of the Constitution, and the country's commitments under International Instruments and Covenants such as the CEDAW, keeping in mind the fact that the Family Courts Act was enacted two years before the 1986 Act for Muslim Women.

63. In *Iqbal Bano v. State of UP and Another* (2007) 6 SCC 785, this Court held that the 1986 Act for Muslim Women only applies to divorced women and not to a woman who was not divorced. In the aforesaid case, this Court held that proceedings under Section 125 of the Cr.P.C. were civil in nature, and if it were noticed that there was a divorced Muslim woman who had made an application under Section 125 Cr. P.C., it was open to the Court to treat the same as a petition under the 1986 Act for Muslim Women, considering the beneficial nature of the legislation.

64. Sub-section (2) of Section 3 provides that where a reasonable and fair provision and maintenance or the amount of mahr or dower due has not been made or paid or the properties referred to in clause (d) of sub-section (1) of Section 3 have not been delivered to a divorced woman on her divorce, she or any one duly authorized by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, mahr or dower or the delivery of properties, as the case may be. In my view, a Family Court having jurisdiction is to be deemed to be the Court of a Magistrate, for the purpose of deciding the claim of a divorced Muslim Woman to maintenance, on a harmonious conjoint reading and construction of Sections 7 and 8 of the Family Courts Act with Sections 3(2), 3(3), 4(1), 4(2), 5 and 7 of the 1986 Act for Muslim Women, in the light of the overriding provision of Section 20 of the Family Courts Act.

65. Sub-section (2) of Section 3 is an enabling provision which enables a divorced Muslim woman to make an application to a Magistrate for an order for payment of maintenance or mehr or dower or delivery of properties, as the case may be. The non-obstante clause is restricted to sub-section (1) of Section 3 and does not cover sub-section (2) of Section 3 of the 1986 Act for Muslim Women. There is no conflict between Section 3(2) of the 1986 Act for Muslim women and the Family Courts Act. On the other hand, Section 20 of the Family Courts Act, 1984 gives overriding effect to the Family Courts Act notwithstanding anything therewith contained in any other law in force. The Family Court is to exercise all

the jurisdiction exercisable by any District Court or any other subordinate Civil court in respect of a proceeding for maintenance.

66. The 1986 Act for Muslim Women is essentially a civil law, which makes provisions for maintenance for divorced Muslim women and not a criminal statute. The 1986 Act for Muslim women does contain any penal provision for any default which enables a divorced Muslim Woman to apply for maintenance under the said Act. The penal provision of the 1986 Act for Muslim Women is only to enforce compliance with an order under Section 31 of the said Act. The punishment of imprisonment is only for non-compliance with the order of maintenance. The Magistrate referred to in Section 3(2) and other Sections of the 1986 Act, is, for all practical purposes, to be deemed to be a Civil Court subordinate to the District Court.

67. Though divorced Muslim women are excluded from the purview of Section 125 of the Cr.PC by reason of the 1986 Act for Muslim Women, Parliament has in its wisdom considered it necessary to make provisions for expeditious orders in applications for maintenance filed by divorced Muslim women. It is with this object in mind that Muslim women have been given the liberty of approaching the Magistrate and the Magistrate is required to make an order within one month from the date of filing of the application and the order of the Magistrate is executable in the same manner for levying fines under the Cr.PC. Violation of an order of the Magistrate entails sentence of imprisonment for a term which might extend to one year or until payment if sooner made, subject to such person being heard in defence and the sentence being imposed according to the provisions of the Cr.PC.

68. In my view, it was never the intention of the 1986 Act for Muslim Women to deprive divorced Muslim Women from the litigant friendly procedures of the Family Courts Act and denude Family Courts of jurisdiction to decide applications for maintenance of divorced Muslim women.

69. If proceedings under Section 125 Cr.P.C. are civil in nature as held by this Court in *Iqbal Bano* (Supra), the Court of the Magistrate dealing with an application under Section 125 Cr.P.C. is to be deemed a Civil Court for the purpose of deciding the application under Section 125 Cr.P.C. On a parity of reasoning, an application under Section 3/4 of the 1986 Act for Muslim Women is also civil in nature. The Court deciding an application under Section 3/4 of the 1986 Act for Muslim Women is to be deemed to be a Civil Court.

70. Thus, the Family Court would have jurisdiction under Section 7 of the Family Courts Act to entertain an application under Section 3 and 4 of 1986 Act for Muslim Women, since the Court of Magistrate dealing with such an application is to be deemed to be a Civil Court subordinate to the District Court.

71. A literal and rigid interpretation of the expression "Subordinate Civil Court" to single out divorced Muslim Women seeking maintenance from their husbands, access to Family Courts when all other women whether divorced or not and even

Muslim Women not divorced can approach Family Courts would be violative of Article 14 of the Constitution.

72. It is true, that a matter which should have been, but has not been provided for in a statute cannot be supplied by courts, as to do so will be legislation and not construction. But there is no presumption that a 'casus omissus' exists and language permitting, the courts should avoid creating a 'casus omissus' where there is none.

73. To quote Denning, L.J. in *Seaford Court Estates Ltd. v. Asher* reported in (1949) 2 All ER 155:

"When a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding of the intention of Parliament and then he must supplement the written words so as to give 'force and life' to the intention of the Legislature. A judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do as they would have done. A judge must not alter the material of which the act is woven, but he can and should iron out the creases".

74. The Supreme Court, while dealing with the definition of 'Industry' in the Industrial Disputes Act, 1947, in *Bangalore Water Supply v. A. Rajappa* AIR 1978 SC 548, approved the rule of construction stated by Denning, L.J. This Court found the definition too general and ambiguous. BEG, C.J.I., said that the situation called for "some judicial heroics to cope with the difficulties raised". Krishna Iyer, J. who delivered the leading majority judgment in that case referred with approbation to the passage extracted above, from the judgment of Denning, L.J. in *Seaford Court Estates Ltd. v. Asher* (supra).

75. The proposition of law which emerges from the judgments referred to above is that, in discharging its interpretative function, the court can even correct obvious drafting errors. In an appropriate case, "the court will add words, or omit words or substitute words". But "before interpreting a statute in this way the Court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question, (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed."

76. Of course in this case, this Court has not added, omitted or substituted anything. This Court has only given a purposive interpretation to the expression Subordinate Civil Court in Section 7 of the Family Courts Act to include the Court of a Magistrate empowered to entertain proceedings for maintenance under the 1986 Act for Muslim Women, which are in essence and substance, civil proceedings.

77. To quote Venkatarama Aiyar, J. in *Tirath Singh v. Bachittar Singh* AIR 1955 SC 830 "where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence."

78. *Tirath Singh v. Bachittar Singh* (supra) has been followed in innumerable judgments of this Court and the passage extracted above has been quoted with approval in *Modern School v. Union of India* reported in (2004) 9 SCC 741.

79. I am of the view that the Family Court, for the reasons discussed above, had the jurisdiction to convert the application of the Appellant under Section 125 of the Cr.P.C into an application under Section 3 of the 1986 Act for Muslim Women and to decide the same.

80. The appeal should, in my view, be allowed. The judgment and order under appeal are liable to be set aside.